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Legal Sidebar

NLRB Reinstates "Overwhelming Community of Interest" Collective Bargaining Unit Standard

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The National Labor Relations Act (NLRA) establishes a right to engage in collective bargaining for most private sector employees. Since 2011, the National Labor Relations Board (NLRB or Board), which enforces and administers the NLRA, has prescribed alternating standards for determining the scope of proposed collective bargaining units. In its 2011 decision *Specialty Healthcare & Rehabilitation Center of Mobile*, the Board indicated that an employer seeking to enlarge a proposed bargaining unit had to establish that any additional employees shared an "overwhelming community of interest" with the proposed unit's employees before the additional employees would be included in the unit. In 2017, the Board overruled *Specialty Healthcare* and returned to a standard of examining whether the interests of the employees in the proposed bargaining unit were sufficiently distinct from other employees to warrant a separate unit (i.e., traditional community of interest standard). In December 2022, the Board reinstated *Specialty Healthcare's* overwhelming community of interest standard in *American Steel Construction*, contending that this standard better promotes the policies of the NLRA and the rights of employees seeking union representation. Some argue, however, that the standard promotes the formation of "micro-units" that may include only a small number of employees and allows unions to organize at businesses where a majority of all employees may not support unionization. This Legal Sidebar provides background on the formation of collective bargaining units and reviews the Board's recent decision in *American Steel Construction*.

Background

The NLRA recognizes the right of most private sector employees to engage in collective bargaining through their chosen representatives. By "encouraging the practice and procedure of collective bargaining," the act attempts to mitigate and eliminate labor-related obstructions to the free flow of commerce.

The NLRA establishes a framework for selecting a bargaining representative for a group of employees. Section 9(b) of the NLRA, codified at 29 U.S.C. § 159(b), provides that the Board shall determine, "to assure to employees the fullest freedom in exercising the rights guaranteed by this [Act], the unit

appropriate for the purposes of collective bargaining[.]" The Board evaluates the appropriateness of a proposed bargaining unit by examining whether the relevant employees share a community of interest. In *United Operations*, the Board identified a variety of factors to be considered:

> [W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised.

A bargaining unit may include the employees of one or more of an employer's locations or the employees in a single department or division. The Board has indicated that, under the community of interest standard, it "need find only that the proposed unit is an appropriate unit, rather than the most appropriate unit, and that there may be multiple sets of appropriate units in any workplace."

In *Specialty Healthcare*, the operator of a nursing home and rehabilitation center argued that a proposed bargaining unit of certified nursing assistants (CNAs) was not appropriate because it did not include other nonprofessional service and maintenance employees at the facility. While the employer did not dispute that the CNAs shared a community of interest with each other, it contended that the appropriate unit was an "overall service and maintenance unit" that would include the CNAs as well as the service and maintenance employees. Rejecting the employer's position, the Board maintained that the community of interest standard is intended to provide employees the "fullest freedom" in exercising their rights under the statute rather than satisfy "an abstract notion of the most appropriate unit." Noting the CNAs' identical job classifications and specialized training, among other common characteristics, the Board determined that they shared a community of interest that was distinct from the service and maintenance workers.

The Board in *Specialty Healthcare* emphasized that a proposed bargaining unit does not have to be the most appropriate unit and indicated that an employer seeking to add employees to a proposed unit had to satisfy a heightened showing. Citing prior Board and judicial decisions, the agency observed that, "[a]lthough different words have been used to describe this heightened showing, in essence, a showing that the included and excluded employees share an overwhelming community of interest has been required." In light of the CNA's distinct duties and characteristics, the Board concluded that the service and maintenance workers did not share an overwhelming community of interest with them.

On December 15, 2017, following the appointment of two new members, a newly constituted NLRB revisited Specialty Healthcare's overwhelming community of interest standard in *PCC Structurals, Inc.*, a case involving a proposed bargaining unit of welders employed by a metal castings manufacturer. In *PCC Structurals*, the employer argued that an appropriate unit should include the welders as well as production and maintenance employees in roughly 120 job classifications. The Board in *PCC Structurals* criticized the overwhelming community of interest standard for limiting its ability to consider the interests of all employees when making bargaining unit determinations. The Board contended that the standard gave a proposed bargaining unit "an artificial supremacy that substantially limits the Board's discretion when discharging its statutory duty to determine unit appropriateness."

Rejecting the overwhelming community of interest standard, the Board maintained that it was reinstituting a more traditional standard that required it to consider whether the shared interests of employees in the proposed bargaining unit were sufficiently distinct from the interests of the employees excluded from the unit to warrant a separate bargaining unit. According to the Board, a focus on sufficiently distinct interests better acknowledged the agency's obligation to make determinations about a bargaining unit's appropriateness and better reflected the NLRA's language. Under Section 9(b) of the act, for example, the Board maintained that it was required "in each case" to "play a more active role, when determining whether or not a proposed unit is 'appropriate' than is allowed under the *Specialty Healthcare* standard." Under this traditional standard, the Board determined that it was required to take

"into consideration the interests of employees both within and outside the proposed bargaining unit" when examining the unit's appropriateness.

American Streel Construction

In December 2022, the Board again considered the standard it should use to determine the scope of a proposed bargaining unit. In *American Steel Construction*, the employer asserted that a proposed unit composed of journeyman and apprentice field ironworkers was inappropriate because it did not include painters, drivers, and inside fabricators who worked at the employer's shop. After an NLRB regional director concluded that the proposed unit was not appropriate because the ironworkers' community of interest was not sufficiently distinct from the other employees, the Board reversed the decision, criticizing the use of the standard established in *PCC Structurals*.

The Board in *American Steel* contended that *PCC Structurals*' focus on "sufficiently distinct" communities of interest was flawed because it infringed on the ability of employees to decide for themselves how they wanted to organize. The Board observed that it was easier under the *PCC Structurals* standard to include additional employees in a bargaining unit because the employer did not have to show that the excluded employees shared an overwhelming community of interest. Unlike the *PCC Structurals* standard, the overwhelming community of interest standard was "deliberately protective of the unit configuration chosen by the petitioning employees."

In *American Steel*, the Board also criticized *PCC Structurals* for "turn[ing] the statutory focus of the unit determination on its head." Rather than provide employees who seek representation the "fullest freedom" to determine how they want to organize, the Board found that *PCC Structurals* protected the right of excluded employees to engage in collective bargaining by making it easier for them to join a proposed unit. The Board emphasized, however, that exclusion from a proposed bargaining unit did not negatively affect the collective bargaining rights of the excluded employees. The Board explained that excluded employees "retain the right to organize separately or to refrain from doing so regardless of whether the petitioned-for employees decide to select a collective-bargaining representative."

Reinstating *Specialty Healthcare*'s overwhelming community of interest standard, the Board in *American Steel* indicated that an overwhelming community of interest exists "[i]f there are only minimal differences, from the perspective of collective-bargaining" between the employees in a proposed bargaining unit and employees excluded from the unit. According to the Board, this standard is consistent with its prior unit determination decisions and the NLRA's statutory policies. The Board maintained that *PCC Structurals*' sufficiently distinct standard could not be explained by the NLRA's text or statutory policy. Moreover, the Board asserted that *PCC Structurals*' justification for its standard was "entirely limited to its criticisms of *Specialty Healthcare*" and "rest[ed] on novel, dubious, and flawed interpretations of statutory provisions."

Consideration for Congress

Following the Board's *Specialty Healthcare* decision in 2011, Members of Congress introduced legislation to respond to the overwhelming community of interest standard. The Representation Fairness Restoration Act (RFRA), introduced in the 112th Congress, would have amended the NLRA to state that a unit "appropriate for purposes of collective bargaining shall consist of employees that share a sufficient community of interest." To determine whether a group of employees shared a sufficient community of interest, the bill would have required the Board to consider eight enumerated factors, including the similarity of wages, benefits, and working conditions among the group and the centrality of management and common supervision of employees in the proposed unit. The RFRA would have also provided that employees could not be excluded from a bargaining unit unless the interests of the employees in the proposed unit were "sufficiently distinct" from those of excluded employees.

The RFRA was introduced again in the 113th, 114th, and 115th Congresses but has not been reintroduced since the Board decided *PCC Structurals*. In light of the Board's reinstatement of the overwhelming community of interest standard, those who oppose the standard could reintroduce the measure or develop alternative legislation that would amend the NLRA and make it more difficult to exclude employees from proposed collective bargaining units. It seems that this kind of legislation would arguably preclude the Board from applying varying standards about excluding employees in the future.

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